RECORD AND BRIEFS

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In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under 8 U.S.C. 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under 8 U.S.C. 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear-and-convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

TABLE OF CONTENTS

Page

Summary of argument 1
Argument:
I. Extensive safeguards exist to protect against arbitrary deprivations of liberty 7
A. Removal proceedings provide extensive protections against arbitrary deprivations of liberty 7
B. Suitably tailored mechanisms exist to address detention of the aliens here 10
C. EOIR expedites removal proceedings for detained aliens 14
D. Class members were usually found removable and ordered removed 16
II. The Constitution does not require bond hearings whenever removal proceedings (and detention incident thereto under Section 1225(b)) last six months 17
A. The Constitution does not require bond hearings whenever incident detention of an alien seeking initial entry lasts six months 18
B. The Constitution does not require bond hearings whenever incident detention of a returning LPR under Section 1225(b) lasts six months 24
III. The Constitution does not require bond hearings whenever removal proceedings for criminal aliens (and detention incident thereto under Section 1226(c)) last six months 27
A. The Constitution provides no basis for a rigid six-month rule 28
1. *Demore* upheld Section 1226(c) as applied to a criminal alien whose removal proceedings already lasted more than six months 28

Table of Contents—Continued: Page

2. The justifications for detaining a criminal alien during his removal proceedings continue for the full duration of those proceedings 30
3. The liberty interests of criminal aliens detained under Section 1226(c) are ordinarily substantially diminished 35
4. The pace of removal proceedings cannot be measured by a one-size-fits-all time limit 37
5. Class members' litigation choices necessitated much of the time that elapsed in removal proceedings and resulting detention 41
6. A constitutional mandate of bond hearings at six months would create a perverse incentive for criminal aliens to prolong proceedings 42
7. Requiring bond hearings for criminal aliens at six months would cause serious problems of flight and recidivism 44

B. As-applied challenges are an adequate and appropriate remedy in extraordinary cases 45

IV. The Constitution does not require the government to conduct bond hearings automatically every six months, to bear the burden of proof (much less by clear-and-convincing evidence), or to change the bond factors 47

A. Automatic hearings are not required 47
B. The government need not bear the burden of proof, much less by clear-and-convincing evidence 49
C. The length of detention is not a relevant bond factor 54

Conclusion 55

TABLE OF AUTHORITIES

Cases: Page

Addington v. *Texas*, 441 U.S. 418 (1979) 33, 34
Barker v. *Wingo*, 407 U.S. 514 (1972) 5, 6, 38, 39, 46, 47
Carlson v. *Landon*, 342 U.S. 524 (1952) 27, 30, 34, 48, 49, 53
Chaffin v. *Stynchcombe*, 412 U.S. 17 (1973) 32
Chavez-Alvarez v. *Warden York Cnty. Prison*, 783 F.3d 469 (3d Cir. 2015) 43
Demore v. *Kim*, 538 U.S. 510 (2003) ..... *passim*
Foucha v. *Louisiana*, 504 U.S. 71 (1992) 33, 34
Galvan v. *Press*, 347 U.S. 522 (1954) 19, 22
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 48
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 19
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 36
Jay v. *Boyd*, 351 U.S. 345 (1956) 36
Joseph, In re, 22 I. & N. Dec. 799 (B.I.A. 1999) 12
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 18, 19, 22
Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953) 24
Landon v. *Plasencia*, 459 U.S. 21 (1982) 4, 18
Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015), petition for cert. pending, No. 15-1205 (filed Mar. 25, 2016), and cert. denied, 136 S. Ct. 2494 (2016) 46
Ly v. *Hansen*, 351 F.3d 263 (6th Cir. 2003) 37, 43
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 48
McGautha v. *California*, 402 U.S. 183 (1971) 32
Morrissey v. *Brewer*, 408 U.S. 471 (1972) 48
Nishimura Ekiu v. *United States*, 142 U.S. 651 (1892) 19
Nken v. *Holder*, 556 U.S. 418 (2009) 13

Cases—Continued: Page

Padilla v. *Kentucky*, 559 U.S. 356 (2010) 12
Reid v. *Donelan*, 819 F.3d 486 (1st Cir. 2016) 28, 43, 46
Reno v. *Flores*, 507 U.S. 292 (1993) 27, 30, 47, 49, 50, 53
Rivens, In re, 25 I. & N. Dec. 623 (B.I.A. 2011) 25
Rossi v. *United States*, 289 U.S. 89 (1933) 52
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 19, 22, 23
Sopo v. *U.S. Att'y Gen.*, 825 F.3d 1199 (11th Cir. 2016) 37, 43, 46, 47
United States v. *Denver & Rio Grande R.R.*, 191 U.S. 84 (1903) 52
United States v. *El-Hage*, 213 F.3d 74 (2d Cir.), cert. denied, 531 U.S. 881 (2000) 40
United States v. *Gelfuso*, 838 F.2d 358 (9th Cir. 1988) 40
United States v. *Gonzales Claudio*, 806 F.2d 334 (2d Cir. 1986) 39
United States v. *Hare*, 873 F.2d 796 (5th Cir. 1989) 39
United States v. *Landron-Class*, 705 F. Supp. 2d 154 (D.P.R. 2010) 40
United States v. *Omar*, 157 F. Supp. 3d 707 (M.D. Tenn. 2016) 40
United States v. *Orena*, 986 F.2d 628 (2d Cir. 1993) 40
United States v. *Quartermaine*, 913 F.2d 910 (11th Cir. 1990) 40
United States v. *Salerno*, 481 U.S. 739 (1987) 33, 35
United States v. *Theron*, 782 F.2d 1510 (10th Cir. 1986) 40
United States v. *Tortora*, 922 F.2d 880 (1st Cir. 1990) 40
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 20
United States v. *Zannino*, 798 F.2d 544 (1st Cir. 1986) 39, 40

Cases—Continued: Page

United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 19
Vermont v. *Brillon*, 556 U.S. 81 (2009) 39
Welch v. *Ashcroft*, 293 F.3d 213 (4th Cir. 2002), abrogated by *Demore* v. *Kim*, 538 U.S. 510 (2003) 28
Wong Wing v. *United States*, 163 U.S. 228 (1896) 20, 27, 30
X-K-, In re, 23 I. & N. Dec. 731 (B.I.A. 2005) 12
Zadvydas v. *Davis*, 533 U.S. 678 (2001) ..... *passim*

Constitution, statutes and regulations:

U.S. Const.:
Amend. V (Due Process Clause) ..... *passim*
Amend. VI 38
Speedy Trial Clause 5, 38, 39, 47
Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* 48
18 U.S.C. 3142(f) 48
18 U.S.C. 3142(f)(2) 55
18 U.S.C. 3143(b)(1)(A) 55
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 53
Immigration Act of 1917, ch. 29, 39 Stat. 874:
§ 16, 39 Stat. 886 17
§ 20, 39 Stat. 891 53
Immigration and Nationality Act, ch. 477, 66 Stat. 163 (8 U.S.C. 1101 *et seq.*):
Tit. II, § 235(b), 66 Stat. 199 17
8 U.S.C. 1101(a)(13)(C) 25, 26
8 U.S.C. 1101(a)(13)(C)(i) 25
8 U.S.C. 1101(a)(13)(C)(ii) 25

Statutes and regulations—Continued: Page

8 U.S.C. 1101(a)(13)(C)(iii) 25, 26
8 U.S.C. 1101(a)(13)(C)(iv) 25
8 U.S.C. 1101(a)(13)(C)(v) 25, 26
8 U.S.C. 1101(a)(13)(C)(vi) 25
8 U.S.C. 1101(b)(4) 8
8 U.S.C. 1103(a)(5) 21
8 U.S.C. 1158 9
8 U.S.C. 1158(a) 8
8 U.S.C. 1158(b)(2)(A) 35
8 U.S.C. 1182(a) 21
8 U.S.C. 1182(a)(2) 26
8 U.S.C. 1182(d)(5) 11, 17, 18, 51
8 U.S.C. 1182(d)(5)(A) 21, 24
8 U.S.C. 1182(f) 25
8 U.S.C. 1225(b) ..... *passim*
8 U.S.C. 1225(b)(1) 25
8 U.S.C. 1225(b)(1)(A)(i) 9
8 U.S.C. 1225(b)(1)(A)(ii) 9
8 U.S.C. 1225(b)(1)(A)(iii) 9
8 U.S.C. 1225(b)(1)(B) 9, 20
8 U.S.C. 1225(b)(1)(B)(ii) 10, 17
8 U.S.C. 1225(b)(1)(B)(iii)(I) 10
8 U.S.C. 1225(b)(1)(B)(iii)(III) 10
8 U.S.C. 1225(b)(1)(C) 9
8 U.S.C. 1225(b)(2)(A) ..... *passim*
8 U.S.C. 1226(a) ..... *passim*
8 U.S.C. 1226(c) ..... *passim*
8 U.S.C. 1226(c)(1) 35
8 U.S.C. 1226(c)(1)(A) 26
8 U.S.C. 1226(c)(2) 50

Statutes and regulations—Continued: Page

8 U.S.C. 1227 12
8 U.S.C. 1229(a) 8
8 U.S.C. 1229a 7
8 U.S.C. 1229a(a)(1) 8
8 U.S.C. 1229a(a)(3) 31
8 U.S.C. 1229a(b)(4)(A) 8
8 U.S.C. 1229a(b)(4)(B) 8, 23
8 U.S.C. 1229a(c)(2) 20
8 U.S.C. 1229a(c)(2)(A) 8
8 U.S.C. 1229a(c)(2)(B) 8
8 U.S.C. 1229a(c)(3) 8
8 U.S.C. 1229a(c)(4) 20
8 U.S.C. 1229a(c)(5) 9
8 U.S.C. 1229a(c)(6) 9
8 U.S.C. 1229b 8
8 U.S.C. 1231(b)(3) 8, 9, 35
8 U.S.C. 1252 9
8 U.S.C. 1252(a)(2)(A) (1994) 52
8 U.S.C. 1252(a)(2)(B) (1994) 52
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* 39
18 U.S.C. 3161(c)(1) 39
18 U.S.C. 3161(h) 39
18 U.S.C. 3164(b) 39
6 U.S.C. 202(1)-(4) 21
28 U.S.C. 1254(1) 9
8 C.F.R.:
Section 208.30(e)(5) 10
Section 212.5 ..... 11, 18
Section 235.3(b)(4)(i)(C) 10
Section 235.3(b)(5) 9

Regulations—Continued: Page

Section 235.3(b)(5)(ii) 25
Section 235.3(c) 11, 18
Section 235.6(a) 10
Section 236.1(c)(8) 12, 13, 49
Section 236.1(d)(1) 13, 48
Section 236.1(d)(3) 12, 48
Section 236.1(d)(3)(i) 13
Section 1003.1(b) 9
Section 1003.19 13
Section 1003.19(e) 13, 48
Section 1003.19(h)(2)(ii) 11, 35
Section 1003.29 ..... 8, 41
Section 1003.38(a) 9
Section 1236.1(d)(1) 13, 48
Section 1236.1(d)(3)(i) 13
Section 1240.7(a) 8
Section 1240.11(c)(1) 8
Section 1240.46(c) 8

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Miscellaneous—Continued: Page

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FY 2015 Statistics Yearbook (Apr. 2016), https://www.justice.gov/eoir/page/file/fysb15/download 44
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Exec. Order, *Protecting the Nation from Foreign Terrorist Entry into the United States* (Jan 27, 2017) 25
62 Fed. Reg. 10,323 (Mar. 6, 1997) 53, 54
67 Fed. Reg. 68,924-68,926 (Nov. 13, 2002) 19
69 Fed. Reg. 48,880 (Aug. 11, 2004) 9
Letter from Ian Heath Gershengorn, Acting Solicitor Gen., to Hon. Scott S. Harris, Clerk, Supreme Court (Aug. 26, 2016), *Demore* v. *Kim*, 538 U.S. 510 (2003) (No. 01-1491) 14
Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Report, Immigration Enforcement Actions: 2013* (Sept. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf 15
Office of the Principal Legal Advisor, U.S. Immigration & Customs Enforcement, *Continuances and Briefing Extensions Before EOIR* (July 1, 2014), https://www.ice.gov.doclib/about/offices/opla/pdf/continuancesBriefing Extensions.pdf 14
Oral Argument Transcript, *Demore* v. *Kim*, 538 U.S. 510 (2003) (No. 01-1491) 50

Miscellaneous—Continued: Page

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SUPPLEMENTAL BRIEF FOR THE PETITIONERS

The United States respectfully submits this supplemental brief in response to the Court's order of December 15, 2016. As set forth below, the Constitution does not require the government to conduct a bond hearing for an alien whenever removal proceedings and detention incident to those proceedings under 8 U.S.C. 1225(b), 1226(c), or 1226(a) last six months. Moreover, in any bond hearing, the Constitution does not require the government to bear the burden of proving that the alien is a flight risk or danger, much less by clear-and-convincing evidence. The Constitution also does not require that the length of past detention be considered as a factor in any bond hearing.

SUMMARY OF ARGUMENT

This Court asked whether the Constitution requires the government to provide a bond hearing, or certain

additional protections, when removal proceedings and detention incident to those proceedings under 8 U.S.C. 1225(b), 1226(c), or 1226(a) last six months. No court has ever held that the Constitution imposes such an inflexible mandate on any one of those provisions, much less all three. And this broad class action does not provide a suitable vehicle for deciding highly individualized questions of when, under the unusual circumstances of a particular case, detention pending removal proceedings could potentially become unconstitutional. Rather, any such questions are appropriately resolved in an as-applied challenge in an individual habeas case that can take into account the reasons that make that case exceptional in the first place.

I. Before determining whether the Due Process Clause requires *more* process, it is critical to understand the baseline that is already provided. Here, many procedural and substantive safeguards exist to prevent arbitrary deprivations of liberty. First, detention pending removal proceedings is by definition accompanied by many protections in those proceedings themselves. Among others, the alien enjoys notice of and an opportunity to dispute the charges against him; the ability to seek continuances; the ability to seek relief or protection from removal even if he is deportable or inadmissible; adjudication by an immigration judge (IJ); and several layers of appellate review. For detained aliens, the passage of time in those proceedings typically reflects the alien's decision to avail himself of these protections, not the lack of process.

In addition, procedures suitably tailored to each subclass of aliens in this case are available for review of detention: Parole consideration for aliens seeking admission detained under Section 1225(b); "*Joseph* hear-

ings" for criminal aliens detained under Section 1226(c); and bond hearings for aliens detained under Section 1226(a). Such aliens in immigration detention are permitted by the government to end removal proceedings, at any time, by accepting a removal order or, in some cases, by simply returning to their native lands. The asylum laws provide additional protections for aliens who fear persecution or torture if they were to return to their native lands. And to minimize interim detention when aliens choose to litigate, the Executive Office for Immigration Review (EOIR) expedites removal proceedings for detained aliens.

For years, the vast majority of removal proceedings for detained aliens have ended long before the six-month mark. And although the class here consists solely of aliens whose proceedings lasted six months or longer, the record shows that those proceedings were typically closer to their end than the beginning. Moreover, class members here were virtually always found removable and usually ordered removed.

II. In light of this, as even the court of appeals recognized, the Due Process Clause does not require bond hearings every six months for all individuals detained under Section 1225(b). Rather, as the court concluded, detention incident to removal proceedings under Section 1225(b) is "clearly" constitutional in "likely the vast majority" of circumstances. Pet. App. 86a. All of the aliens at issue here are placed in removal proceedings before an IJ; the government allows them to end that detention at any time by accepting an order of removal or, in some instances, simply by returning to their native lands; the government expedites proceedings to minimize detention for those who remain; release on parole is a possibility; and Congress has provided

added protections for the subset who fear persecution or torture.

Whatever due process might require in this context, this framework easily suffices as a facial matter. In virtually all cases, Section 1225(b) is applied to aliens seeking initial entry. This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). In unusual circumstances, Section 1225(b) can also apply to lawful permanent residents (LPRs) returning from abroad. But in any extraordinary circumstances, case-specific issues can be appropriately addressed in an as-applied challenge. There is no basis for the broad, unbending six-month rule adopted by the courts below.

III. The same is true for criminal or terrorist aliens under Section 1226(c). In *Demore* v. *Kim*, 538 U.S. 510 (2003), this Court affirmed the mandatory detention pending removal proceedings of a criminal alien for longer than six months, where he would be returned to additional detention on remand until his proceedings were completed. That decision implicitly forecloses a six-month rule.

As *Demore* itself illustrates, the mere passage of six months in removal proceedings does not demonstrate that interim detention of a criminal alien under Section 1226(c) no longer "serve[s] its purported immigration purpose." 538 U.S. at 527. Rather, such detention will virtually always serve those purposes for the full duration of removal proceedings. A criminal alien's danger to the community will typically remain constant, and the government's interest in retaining custody over

the alien to effectuate removal will usually increase over time. That interest is particularly strong when an order of removal is about to be entered, and stronger still when an order of removal has already been entered and the alien is pursuing appellate review. That is also when a criminal alien's incentives to flee are particularly high.

Criminal aliens detained under Section 1226(c), moreover, have substantially decreased liberty interests. The criminal offense that renders those aliens subject to mandatory detention also makes those aliens removable and, in the end, the government's charges are virtually always sustained. To be sure, criminal aliens often seek discretionary relief from removal. But they have a diminished claim to be at liberty while the Attorney General or Secretary of Homeland Security considers whether to exercise that discretion to allow them to remain in this country notwithstanding their past crimes that render them removable. Moreover, when a criminal alien has been ordered removed by the IJ or the Board of Immigration Appeals (BIA) but then himself seeks further review, he again has a diminished claim to be at liberty inside the United States during the time needed to adjudicate his appeal.

Nor can the pace of removal proceedings be measured with a rigid six-month yardstick. The duration of removal proceedings is inherently elastic, because it depends on myriad factors, including an alien's decisions to seek continuances, relief from removal, or appellate review. This Court has rejected an inflexible six-month deadline under the Speedy Trial Clause for similar reasons: A court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker* v. *Wingo*, 407 U.S.

514, 521 (1972), and a rigid six-month deadline "would require this Court to engage in legislative or rulemaking activity," *id.* at 523. So too here.

A one-size-fits-all rule would also create a perverse incentive for criminal aliens detained under Section 1226(c) to prolong their removal proceedings in the hope of obtaining a bond hearing and the possibility of release into the United States that would otherwise be prohibited. Here, for example, a substantially larger portion of class members overall were granted bond (and released) than were permitted to remain in the United States at the end of their proceedings. Consequently, in some cases, a criminal alien's best chance of remaining will be by obtaining release on bond pending the conclusion of their removal proceedings, during which they may abscond. Congress made detention mandatory, however, because experience showed that individualized screening of criminal aliens was ineffective at preventing flight and protecting the safety of the community. And once again, any extraordinary cases can be addressed in as-applied challenges tailored to the facts and circumstances of the particular case. There is no basis for the inflexible rule adopted by the courts below.

IV. It follows *a fortiori* that the Due Process Clause does not impose an unbending requirement that the government conduct bond hearings—automatically every six months no matter what—to justify continued detention pending removal proceedings for aliens detained under Section 1226(a). After all, every alien detained under Section 1226(a) already has had an individualized bond hearing, and may obtain another if circumstances change materially.

The Constitution also provides no basis for requiring the government to bear the burden of proving that the alien will be a flight risk or a danger—much less to do so by clear-and-convincing evidence. Indeed, this Court has consistently upheld detention pending removal proceedings notwithstanding that the government has *never* borne a clear-and-convincing burden.

Finally, even if due process did require a bond hearing at the six-month mark, the length of detention would be irrelevant to determining whether bond would be appropriate. Rather, the relevant factors to consider are flight risk and danger to the community. Those risks do not diminish, and, indeed, may well increase as removal proceedings near their end and removal becomes imminent. The Due Process Clause therefore does not require IJs, as a substantive matter, to consider the length of detention as a factor weighing in favor of release.

ARGUMENT

I. Extensive Safeguards Exist To Protect Against Arbitrary Deprivations Of Liberty

A. Removal Proceedings Provide Extensive Protections Against Arbitrary Deprivations Of Liberty

1. When an alien is detained incident to removal proceedings under 8 U.S.C. 1229a, those proceedings themselves supply extensive safeguards against the arbitrary deprivation of liberty. An alien seeking admission at our Nation's borders cannot be placed into removal proceedings under Section 1229a in the first place if he is "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A). And if he is placed into removal proceedings, he may defeat the charge by demonstrating that he is "clearly and beyond doubt

entitled to be admitted" or "lawfully present in the United States pursuant to a prior admission." 8 U.S.C. 1229a(c)(2)(A) and (B).

When an alien is already admitted to the United States, the government generally cannot initiate removal proceedings without a warrant or notice to appear, 8 U.S.C. 1229(a), and the government bears the burden of proving by clear-and-convincing evidence that he is deportable, 8 U.S.C. 1229a(c)(3). And even if an alien is removable, he may apply for various forms of relief or protection from removal, such as asylum, withholding of removal, or cancellation of removal, which would permit the alien to remain in the United States notwithstanding that he lacks any right to live here. *E.g.*, 8 U.S.C. 1158(a), 1229b, 1231(b)(3).[1]

The decision whether to order such an alien removed is made by an IJ in EOIR in the Department of Justice. 8 U.S.C. 1101(b)(4), 1229a(a)(1). IJs must inform aliens of certain forms of eligibility for relief. For example, if an alien expresses fear of persecution or harm upon return, an IJ must advise him that he may apply for asylum or withholding of removal. 8 C.F.R. 1240.11(c)(1).

Aliens may obtain continuances "for good cause shown." 8 C.F.R. 1003.29. They have a right to the counsel of their choice at no expense to the government, 8 U.S.C. 1229a(b)(4)(A); the right to testify; and the right to "examine the evidence against the alien," "to present evidence," and "to cross-examine witnesses presented by the Government," subject to an exception for disclosure of certain national-security information, 8 U.S.C. 1229a(b)(4)(B); see 8 C.F.R. 1240.7(a), 1240.46(c).

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[1] For simplicity, this brief uses the word "relief" to refer to both relief from removal and protection from removal.

Aliens ordered removed may ask the IJ to reconsider that determination. 8 U.S.C. 1229a(c)(6). They are also informed that they have a right to appeal. 8 U.S.C. 1229a(c)(5); 8 C.F.R. 1003.1(b), 1003.38(a). If an alien appeals and the BIA enters a final order of removal, the alien may file a petition for review in a court of appeals, 8 U.S.C. 1252, and seek review in this Court, 28 U.S.C. 1254(1).

2. "Expedited removal" (ER) exists for certain aliens who are clearly removable: (1) aliens arriving at a port of entry who lack valid documentation or who seek to enter via fraud; and (2) certain other aliens who entered illegally without valid documentation or via fraud, have been present less than two years, and were designated by the Secretary for ER. 8 U.S.C. 1225(b)(1)(A)(i) and (iii); see 69 Fed. Reg. 48,880 (Aug. 11, 2004) (designating aliens encountered within 14 days of the unlawful entry and 100 miles of the border); 67 Fed. Reg. 68,924-68,926 (Nov. 13, 2002) (arrivals by sea). Ordinarily, such aliens are ordered removed without a further hearing. 8 U.S.C. 1225(b)(1)(A)(i). Respondents concede (Br. 2-4) that ER is not at issue here.

Congress, moreover, added special protections for aliens who are subject to ER but seek asylum or claim a fear of persecution or torture. See 8 U.S.C. 1225(b)(1)(A)(ii) and (B); see also 8 U.S.C. 1158, 1231(b)(3).[2] In such a case, a U.S. Citizenship and Immigration Services (USCIS) asylum officer will interview the alien to determine whether the asserted fear is credible. 8 U.S.C. 1225(b)(1)(A)(ii). If the asylum officer finds it is not credible, he must inform the alien

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[2] Special protections also exist for LPRs, refugees, asylees, and individuals claiming U.S. citizenship. See 8 U.S.C. 1225(b)(1)(C); 8 C.F.R. 235.3(b)(5).

that he can request a review by an IJ, which must occur "as expeditiously as possible" and within seven days. 8 U.S.C. 1225(b)(1)(B)(iii)(III); see 8 C.F.R. 235.3(b)(4)(i)(C). If the asylum officer's decision stands, the alien is to be removed forthwith through ER. 8 U.S.C. 1225(b)(1)(B)(iii)(I). If the alien's fear is found credible, however, he is placed into removal proceedings before an IJ to consider whether to grant asylum or similar relief. 8 C.F.R. 208.30(e)(5), 235.6(a); see 8 U.S.C. 1225(b)(1)(B)(ii).

B. Suitably Tailored Mechanisms Exist To Address Detention Of The Aliens Here

1. The statutory and regulatory framework furnishes mechanisms, tailored to the status of the alien, in which questions concerning custody during removal proceedings may be addressed.

Section 1225(b): Parole. The Section 1225(b) subclass consists of aliens in removal proceedings and incident detention, for six months, under two of its subsections: (b)(1)(B)(ii) and (b)(2)(A). Resps. Br. 2-4. The first category consists of aliens arriving at a port of entry without valid documentation or seeking to enter through fraud, but who passed the credible-fear screening process and are in removal proceedings (not ER). 8 C.F.R. 208.30(e)(5); see 8 U.S.C. 1225(b)(1)(B)(ii). The second category consists of other aliens seeking admission to the United States who have not demonstrated upon their arrival that they are "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. 1225(b)(2)(A).

Aliens in both categories "shall be detained" during the proceedings to determine whether they will be admitted or instead ordered removed. 8 U.S.C. 1225(b)(1)(B)(ii) and (2)(A). Any alien detained under

either provision nonetheless may request that the Secretary parole him into the United States "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 C.F.R. 212.5, 235.3(c).[3] Like release on bond, release on parole can allow the alien to live inside the United States during his proceedings.

Section 1226(c): Joseph *Hearings.* Section 1226(c) mandates that certain criminal and terrorist aliens be detained pending removal proceedings. 8 U.S.C. 1226(c). When a U.S. Immigration and Customs Enforcement (ICE) officer determines that an alien is subject to such mandatory detention, the alien is informed of the decision and that he may challenge it via a "*Joseph* hearing." 8 C.F.R. 1003.19(h)(2)(ii); *Demore* v. *Kim*, 538 U.S. 510, 514 & n.3 (2003). At a *Joseph* hearing, the IJ determines whether the alien is "properly included" in a mandatory-detention category. 8 C.F.R. 1003.19(h)(2)(ii). "[T]he detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [government] is otherwise substantially unlikely to

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[3] For aliens in the first category (*i.e.*, arriving aliens with a credible fear of persecution), U.S. Immigration and Customs Enforcement has had a policy to consider parole automatically and ordinarily to release the alien unless he fails to provide sufficient evidence of his identity or fails to show that he will not be a flight risk or danger. J.A. 48-50; see Gov't Br. 28-29. On January 25, 2017, the President issued an Executive Order directing the Secretary, *inter alia*, to ensure that parole authority "is exercised only on a case-by-case basis in accordance with the plain language" of 8 U.S.C. 1182(d)(5), "and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole." Exec. Order, *Border Security and Immigration Enforcement Improvements* § 11(d).

establish that he is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3; see *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). Aliens with criminal convictions also have had the procedural protections of the criminal proceeding itself. Those include the right to counsel who must advise the defendant of possible immigration consequences of a conviction under existing law before an alien pleads guilty. *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010).

An alien may appeal an adverse *Joseph* decision to the BIA. 8 C.F.R. 236.1(d)(3). If the alien prevails, Section 1226(c) will not apply and the alien will be eligible for release on bond under Section 1226(a). Thus, whenever a criminal alien remains detained under Section 1226(c), he has either forgone a *Joseph* hearing, or the IJ (or BIA) has found, on an individualized basis, "at least some merit to the [government's] charge." *Demore*, 538 U.S. at 531 (Kennedy, J., concurring).

Section 1226(a): Bond Hearings. Section 1226(a) governs the detention and release of other aliens arrested inside the United States. 8 U.S.C. 1226(a). This encompasses aliens in a wide variety of circumstances, including those who are present after entering illegally; aliens who were lawfully admitted but overstayed a visa; and aliens who committed a crime that rendered them removable (but not subject to mandatory detention).[4] See 8 U.S.C. 1227.

Every such alien is individually considered for release on bond. 8 C.F.R. 236.1(c)(8). An ICE officer

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[4] This category also currently includes aliens who entered illegally without valid travel documentation or via fraud, were caught within 14 days of entering illegally and within 100 miles of a U.S. land border, and were found to have a credible fear. *In re X-K-*, 23 I. & N. Dec. 731, 732-735 (B.I.A. 2005); see Gov't Br. 18 n.5.

assesses whether the alien has "demonstrate[d]" that "release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." *Ibid.* If the officer denies bond (or sets a bond the alien thinks is too high), the alien may ask an IJ for a redetermination of the custody decision. 8 C.F.R. 236.1(d)(1), 1003.19, 1236.1(d)(1).

The alien may appeal the IJ's custody redetermination to the BIA. 8 C.F.R. 236.1(d)(3)(i), 1236.1(d)(3)(i). An alien who remains detained under Section 1226(a) may later obtain another custody determination whenever "circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e).

2. Of course, the government allows aliens in immigration detention pending removal proceedings to end those proceedings, at any time, by accepting a final order of removal, qualifying for voluntary departure, or, in some circumstances, by simply returning home. But an alien who files a petition for review in a court of appeals after the BIA has entered a final order of removal has an additional option: He can forgo seeking a stay of removal, depart or be removed, and continue to challenge the removal order from abroad. See *Nken* v. *Holder*, 556 U.S. 418, 424 (2009). If the alien ultimately prevails, ICE's policy is, "[a]bsent extraordinary circumstances," to "facilitate the alien's return to the United States" when the decision either restores the alien to LPR status "or the alien's presence is necessary for continued administrative removal proceedings." ICE, *Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, Directive No. 11061.1, at ¶ 2 (Feb. 24, 2012).

C. EOIR Expedites Removal Proceedings For Detained Aliens

To avoid unnecessary detention pending removal proceedings, EOIR prioritizes adjudication of cases involving detained aliens. See Dep't of Justice, *Administrative Review and Appeals: FY 2017 Performance Budget, Congressional Budget Submission* 19 (*EOIR Budget Request*). ICE policy is similarly for its attorneys to seek continuances in detained cases only when "absolutely necessary," and to seek to expedite any applications for adjustment of status or other relief that the alien might choose to file with USCIS during removal proceedings. Office of the Principal Legal Advisor, ICE, *Continuances and Briefing Extensions Before EOIR* (July 1, 2014); see ICE, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions* 1-3 (Aug. 20, 2010).

As a result, for example, IJs typically completed non-appealed cases in fiscal year 2001 involving aliens in immigration detention, with charges that can trigger mandatory detention under Section 1226(c), in substantially less than 90 days. *Demore*, 538 U.S. at 529-531; Gov't *Demore* Letter 1-3 (median of 15 days). In the small fraction of such detained criminal cases where there was an appeal, the BIA typically completed the appeal in about four months, with a typical overall time of about nine months to complete both stages of review. Gov't *Demore* Letter 2-3 (medians of 119 days and 272 days, respectively).

EOIR has published statistics reporting similar rates for each fiscal year from 1999 through 2015: Each year, EOIR has found, the median time for non-appealed cases was well below 90 days, and the median

time to complete both IJ and BIA stages was less than ten months in appealed cases.[5] EOIR has also reported similar figures to Congress regarding IJ completion times (and BIA completion times in appealed cases), from fiscal years 2011 through 2015, for all aliens in immigration detention, not merely criminal aliens subject to mandatory detention under Section 1226(c). *EOIR Budget Request* 18-19.[6]

Even among the class in this case—which consists solely of cases lasting six months or longer—the six-month mark was usually closer to the end than the beginning of proceedings. The government's expert found that removal proceedings and detention for the majority of in-period aliens ended by ten months, J.A. 187 (median 286 days);[7] for two-thirds it ended by one year, J.A. 188; and among the remaining third, more than half were released by sixteen months, *ibid.* He also found that median completion times were considerably longer for those who sought continuances, relief from removal, BIA review, or Ninth Circuit review. See J.A. 136-137, 153, 191, 195-196.

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[5] EOIR, *Certain Criminal Charge Completion Statistics*, Tbls. 1, 3 (Aug. 2016). The averages are longer, *ibid.*, indicating "a short fat tail to the left and a long skinny tail to the right," with some cases taking an unusually long time, J.A. 168.

[6] In ER proceedings, a final removal order is entered essentially immediately. ICE reported that, in fiscal year 2013, it completed nearly 200,000 cases via that process. Office of Immigration Statistics, Dep't of Homeland Sec., *Annual Report, Immigration Enforcement Actions: 2013*, Tbl. 7 (Sept. 2014).

[7] The government's expert focused on "in-period" aliens to correct for a selection bias in the sampled data that skewed the figures upwards. J.A. 140-143. Even without this correction, the six-month mark was usually closer to the end than the beginning. J.A. 187.

D. Class Members Were Usually Found Removable And Ordered Removed

The framework described above affords aliens numerous procedural protections and, in many cases, opportunities to seek relief from removal. Members of the class in this case often availed themselves of those protections and opportunities. For example, the government's expert found that 71.9% of in-period cases involved a request for relief from removal, 29.8% involved a BIA appeal, and 15.7% involved Ninth Circuit review. J.A. 190, 192. The record shows, however, that when class members' cases were completed, the alien was virtually always found removable and usually ordered removed. Fewer than 5% of studied class members with completed cases won a "termination." J.A. 199 (20 of 546 completed in-period cases, or 34 of 840 completed cases overall). That is, more than 95% were found removable and thus to lack any substantive right to be at liberty inside the United States.

More than two-thirds of class members with completed cases were removed, ordered removed, or allowed to voluntarily depart. See J.A. 199 (370 of the 546 in-period completed cases ended in one of those ways, as did 577 of the 840 completed cases for studied class members overall). And among the minority who obtained relief from removal, virtually all obtained discretionary relief: Of the 229 studied class members who obtained relief from removal, J.A. 83, the vast majority (222) obtained discretionary relief, J.A. 79 Tbl. 10 & n.*. Only seven people—less than 1% of studied class members with completed cases—sought or obtained solely mandatory withholding of removal. *Ibid.*

Aliens who appealed almost never prevailed. Respondents' expert found that only 6% of class members

who appealed to the BIA obtained a remand or reversal. J.A. 536. Ninth Circuit review was similarly fruitless. 197 class members filed a petition for review, J.A. 75, and 72 of those remained pending at the time of the expert reports, J.A. 84. Of the 122 completed Ninth Circuit cases, the alien prevailed in only six. J.A. 201 Tbl. L-16 ("All"). Class members who completed BIA review, or both BIA *and* Ninth Circuit review, thus were unsuccessful about 95% of the time.

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As explained below, against this backdrop, the inflexible rule adopted below is plainly not required by the Due Process Clause.

II. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings (And Detention Incident Thereto Under Section 1225(b)) Last Six Months

Section 1225(b) codifies the rule that has protected our Nation's borders for a century: When an applicant for admission is "not clearly and beyond a doubt entitled" to be admitted, he "shall be detained" pending proceedings to determine whether he should be removed. 8 U.S.C. 1225(b)(2)(A); see Immigration and Nationality Act, ch. 477, Tit. II, § 235(b), 66 Stat. 199; Immigration Act of 1917 (1917 Act), ch. 29, § 16, 39 Stat. 886. Section 1225(b)(1)(B)(ii) similarly mandates interim detention for a subset of aliens who are obviously inadmissible—arriving aliens who lack valid documentation or sought to enter through fraud—who are nonetheless in ongoing IJ removal proceedings (rather than ordered removed immediately via ER) because they have been found to have a credible fear of persecution or torture. 8 U.S.C. 1225(b)(1)(B)(ii). Under either provision, an alien may request that the Secretary release him into the United States on parole. 8 U.S.C.

1182(d)(5); 8 C.F.R. 212.5, 235.3(c). The government also expedites removal proceedings for aliens who remain detained, allows them to end those proceedings at any time by accepting a removal order, and even sometimes by simply returning to their native lands.

Even the court of appeals recognized that Section 1225(b) is "clearly" constitutional as applied to "likely the vast majority" of aliens, without a bond hearing, because those are aliens seeking their initial entry into the United States. Pet. App. 86a. For that category—the core of the government's inherent power to protect the Nation's borders and control immigration—the existing framework affords important procedural protections and plainly comports with the Constitution. The court was instead concerned that Section 1225(b) could potentially give rise to constitutional doubt as applied to an LPR returning from abroad. But that situation is unusual and does not remotely justify an across-the-board requirement of bond hearings at the six-month mark—as a matter of constitutional law—even for all LPRs, much less for all aliens seeking initial entry. Rather, in an outlier case, an alien may bring an as-applied challenge to take into account any such concern.

A. The Constitution Does Not Require Bond Hearings Whenever Incident Detention Of An Alien Seeking Initial Entry Lasts Six Months

1. This Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972); see *Zadvydas* v.

Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *Mandel*, 408 U.S. at 767 ("[T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.") (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied [initial] entry is concerned.") (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591 (1952); *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659-660 (1892).

Control of the Nation's borders is vested in the political Branches because it is "vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades*, 342 U.S. at 588-589. "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Nishimura Ekiu*, 142 U.S. at 659.

Interim detention under Section 1225(b) is integral to protecting our Nation's borders. By definition, an alien at the threshold of initial entry who has initially been found "not clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A), or who is seeking

initial admission without valid documentation or via fraud, 8 U.S.C. 1225(b)(1)(B), lacks any entitlement to enter the United States at that time. The purpose of the removal proceeding at that point is to afford the alien an opportunity to establish that he *is* in fact clearly and beyond a doubt entitled to be admitted, or should be granted asylum or withholding of removal notwithstanding that he is inadmissible. 8 U.S.C. 1229a(c)(2) and (4). Temporary detention in the interim prevents the alien from jumping the gun and being at large inside the United States before those determinations are made. As the Court put it "more than a century ago," removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896)).

Furthermore, by definition, an alien seeking initial entry lacks any constitutionally cognizable interest in being released into the United States while doubts about his status are resolved. In contemplation of law, that alien is outside the United States. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). To put it another way, when an alien is seeking initial entry, detaining him incident to removal proceedings preserves the status quo and is necessary to effectuate the alien's continued exclusion until he affirmatively establishes in those proceedings that he should be permitted to enter for the first time. Requiring the release of the alien into the United States before that determination has been made, by contrast, would de-

feat that purpose and put him into a position where he could cause the harms to public health, safety and security, and the labor markets that Congress enacted the immigration laws to prevent. See 8 U.S.C. 1182(a).

Congress has authorized the Secretary to release such an alien into the United States on parole, "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A). But Congress has entrusted that important discretionary decision—whether to allow such an alien into the United States before he has been determined to be admissible —to the Secretary, *ibid.*, who is charged with "[p]reventing the entry of terrorists," "[s]ecuring the borders," "[c]arrying out [certain] immigration enforcement functions," and establishing rules governing parole, 6 U.S.C. 202(1)-(4); see 8 U.S.C. 1103(a)(5) (Secretary "shall have the power and duty to control and guard the boundaries and borders of the United States against illegal entry of aliens.").

This constellation of measures—including the removal hearing itself, the credible-fear screening process, the possibility of parole, and expedited treatment for those who remain in custody—affords meaningful protection for aliens arriving at our borders and seeking to enter for the first time.

2. Respondents have provided no basis for interpreting the Constitution itself to impose an inflexible mandate of IJ bond hearings at the six-month mark for such aliens, thereby upending the longstanding statutory and constitutional framework governing control of the borders. Respondents contend (Br. 29-30) that *Mezei* is anachronistic. But the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immi-

gration law." *Zadvydas*, 533 U.S. at 693; cf. *id.* at 682 (noting that "[a]liens who have not yet gained initial admission to this country would present a very different question"). This Court has repeatedly rebuffed requests to reconsider that distinction. See *Mandel*, 408 U.S. at 765-767 ("We are not inclined in the present context to reconsider this line of cases."); *Galvan*, 347 U.S. at 531 ("As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume.") (citation omitted).

Indeed, it follows *a fortiori* from this Court's precedents that there is no constitutional basis for requiring bond hearings, and possible release into the United States, at the six-month mark for aliens first arriving at the Nation's borders. *Mezei* involved the indefinite detention of an alien who the Court found to be on the threshold of initial entry (an LPR returning from a nearly two-year trip abroad) who was taken into custody when he arrived at our shores. 345 U.S. at 207-209. He was denied notice of or opportunity to dispute the basis for his exclusion, on national-security grounds, and was unable to depart because his home countries refused to "take him back." *Id.* at 207. Yet relying on the principles above, the Court concluded that his "continued exclusion [does not] deprive[] him of any statutory or constitutional right." *Id.* at 215. Four Justices dissented on the ground that, in their view, the Due Process Clause required the government to provide Mezei notice of and opportunity to dispute the basis for his exclusion. *E.g.*, *id.* at 218 (Black, J., dissenting); *id.* at 227 (Jackson, J., dissenting). But no Justice contended that he had a right to enter the United States during the time needed to effectuate his exclusion, or a right to a bond hearing with the possibility of

release into the United States in the interim. To the contrary, Justice Jackson agreed that "[d]ue process does not invest any alien with a right to enter the United States." *Id.* at 222.

This broad class action also provides no basis for addressing the proper resolution of outlier cases, because the existing framework for aliens seeking initial entry provides greater procedural protections, and imposes less onerous restrictions, than those at issue in *Mezei*. Unlike the alien in *Mezei*, "likely the vast majority" of aliens detained under Section 1225(b) have never had LPR status. Pet. App. 86a. Unlike in *Mezei*, the detention here is not open-ended. It is inherently temporary because it has an "obvious termination point"—the completion of removal proceedings—that comes in every case. *Demore*, 538 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 697). The government expedites detained cases to minimize the time it will take to get to that inevitable end. See pp. 14-16, *supra*. Unlike in *Mezei*, the aliens here are in removal proceedings that provide the notice and opportunity to be heard the *Mezei* dissenters concluded were necessary. *E.g.*, 345 U.S. at 222-223 (Jackson, J., dissenting).[8] Unlike in *Mezei*, virtually all aliens detained pending removal proceedings can end detention by returning to their native lands. The asylum laws and credible-fear process, moreover, provide added protection for the subset of newly arriving aliens who fear returning because of possible persecution or torture. See pp. 9-10, *supra*. And parole is available in the meantime, "on a case-by-case basis for urgent humani-

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[8] National-security limitations on disclosure in particular cases are not at issue here. See 8 U.S.C. 1229a(b)(4)(B).

tarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A).

A constitutional mandate that *all* such aliens must be given bond hearings, whenever proceedings last six months, would leave an "unprotected spot in the Nation's armor," *Zadvydas*, 533 U.S. at 695-696 (quoting *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 602 (1953)), that Congress could not close. It would create a powerful incentive for aliens to come to the United States and then prolong removal proceedings in the hope of obtaining a bond hearing and thereafter entering the United States. And it would effectively convert the many protections incorporated into removal proceedings into a mechanism the alien could use to enter the United States. By seeking continuances, relief from removal, appealing, or otherwise prolonging litigation to the six-month mark, the alien would gain a right to a bond hearing and in turn the possibility of entering the United States over the Secretary's objection. Moreover, because the bond mandate would stem from the Constitution itself, Congress could not change it. That cannot be right.

B. The Constitution Does Not Require Bond Hearings Whenever Incident Detention Of A Returning LPR Under Section 1225(b) Lasts Six Months

The court of appeals imposed an across-the-board mandate of bond hearings at the six-month mark under Section 1225(b), as a matter of statutory interpretation, out of concern that Section 1225(b) could, in unusual cases, give rise to constitutional doubt as applied to an LPR returning from abroad. Pet. App. 41a-45a. But even the court did not contend that the Constitution itself mandated a six-month rule for all such LPRs, much less for all aliens seeking admission.

LPRs have a series of protections against detention under Section 1225(b). A verified LPR is wholly exempt from being placed into ER proceedings under Section 1225(b)(1), see 8 C.F.R. 235.3(b)(5)(ii), and is generally exempt from detention under Section 1225(b)(2)(A). That latter provision applies only to an "applicant for admission," 8 U.S.C. 1225(b)(2)(A), and Congress has provided that LPRs "shall not be regarded" as applicants for admission unless the government proves, by clear-and-convincing evidence, that one of six narrow exceptions applies, 8 U.S.C. 1101(a)(13)(C); see *In re Rivens*, 25 I. & N. Dec. 623, 625-626 (B.I.A. 2011).[9]

Moreover, in the unusual circumstance where an LPR could lawfully be regarded as an applicant for admission and thus subject to detention under Section 1225(b), that treatment would virtually always be constitutional. There is no constitutional problem with assimilating an LPR to the status of a new entrant when he (1) has "abandoned or relinquished" his lawful status; (2) has been continually absent from the country for more than 180 days, as in *Mezei*; (3) has departed the country during removal proceedings; or (4) attempted to enter outside a designated port of entry. 8 U.S.C. 1101(a)(13)(C)(i), (ii), (iv), and (vi).

The only two remaining exceptions involve criminality. 8 U.S.C. 1101(a)(13)(C)(iii) and (v). Congress has provided that a returning LPR may be treated as a new arrival if he has committed a criminal offense that

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[9] On January 27, 2017, the President, pursuant to his distinct statutory authority under 8 U.S.C. 1182(f), has temporarily suspended the entry of aliens from certain countries, subject to certain exceptions. Exec. Order, *Protecting the Nation from Foreign Terrorist Entry into the United States* § 5(c) and (g). The Executive Order is not at issue in this case.

renders him inadmissible under 8 U.S.C. 1182(a)(2). 8 U.S.C. 1101(a)(13)(C)(v). But such an offense also triggers mandatory detention under Section 1226(c), see 8 U.S.C. 1226(c)(1)(A), which this Court upheld in a case involving an LPR inside the United States who was detained for more than six months, *Demore*, 538 U.S. at 531. It follows *a fortiori* that similar treatment is facially constitutional under Section 1225(b)(2)(A) for an LPR who has left the United States and is seeking to return. Treating a returning LPR as a new arrival would be similarly constitutional under *Demore* if, under the last exception, the LPR sought to return after committing a similar offense after departing the United States. See 8 U.S.C. 1101(a)(13)(C)(iii). An LPR who is returning to the United States with cocaine in his luggage, for example, does not have a greater interest in being released into the United States in the interim than an LPR who was already at liberty inside the United States but then committed a similar crime that makes him subject to mandatory detention under Section 1226(c).

Finally, for the reasons set forth below concerning criminal aliens detained under Section 1226(c), see pp. 27-47, *infra*, any outlier cases involving LPRs under 8 U.S.C. 1101(a)(13)(C) cannot support an across-the-board requirement of bond hearings at the six-month mark under Section 1225(b). Rather, in any exceptional case, an LPR can bring an as-applied constitutional challenge in an individual habeas action, where a court can consider the facts and circumstances of that particular case. There is no basis for the broad and inflexible rule adopted by the courts below.

III. The Constitution Does Not Require Bond Hearings Whenever Removal Proceedings For Criminal Aliens (And Detention Incident Thereto Under Section 1226(c)) Last Six Months

It is well-established that "detention during deportation proceedings [i]s a constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523. In every case in which detention incident to removal proceedings has arisen, the Court has concluded that it is constitutional. *Ibid.*; see *Reno* v. *Flores*, 507 U.S. 292, 306 (1993) ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings."); *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing*, 163 U.S. at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."). And in *Demore*, the Court squarely rejected a constitutional challenge to Section 1226(c), which mandates detention of certain criminal and terrorist aliens pending removal proceedings, without the opportunity for release on bond. The Court affirmed Congress's categorical judgment, holding that "Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as [the LPR in that case] be detained for the brief period necessary for their removal proceedings." *Demore*, 538 U.S. at 513.

A. The Constitution Provides No Basis For A Rigid Six-Month Rule

The Due Process Clause does not render Section 1226(c) unconstitutional whenever removal proceedings, and the detention that is an integral part of those proceedings, last six months.

1. Demore *upheld Section 1226(c) as applied to a criminal alien whose removal proceedings already lasted more than six months*

At the outset, in *Demore* itself, the alien had already "spen[t] six months" in immigration custody before this Court upheld the constitutionality of his mandatory detention. 538 U.S. at 531; see Gov't Br. 35-36 & n.11. And as a result of the Court's reversal of the decision affirming his release, he was to be returned to custody until removal proceedings were completed, which would take additional time. He had not yet had his removal hearing (because he asked for a continuance), and he could still appeal to the BIA if the IJ ordered him removed. *Demore*, 538 U.S. at 530-531; see Am. Immigration Council et al. Amicus Br. 8 n.4 (stating that the alien was detained ten more months). *Demore* itself thus "implicitly foreclose[s]" the notion that the Constitution mandates a bond hearing at the six-month mark under Section 1226(c). *Reid* v. *Donelan*, 819 F.3d 486, 497 (1st Cir. 2016).

Demore also rejected the analogy to *Zadvydas* that had been the basis for some courts to require bond hearings at the six-month mark under Section 1226(c) as a matter of statutory interpretation. See *Demore*, 538 U.S. at 516 (abrogating *Welch* v. *Ashcroft*, 293 F.3d 213 (4th Cir. 2002)). *Demore* explained that the two situations were "materially different." *Id.* at 527. First, the Court determined that the detention in *Zad-*

vydas no longer "serve[d] its purported immigration purpose." *Ibid.* Aliens are detained after they are ordered removed in order to effectuate their removal, but in *Zadvydas* removal was "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Other countries had refused to accept the aliens, so there was no country to which to return them. See *Zadvydas*, 533 U.S. at 684, 702. By contrast, this Court emphasized in *Demore* that detention of criminal aliens "*pending their removal proceedings* * * * necessarily serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." 538 U.S. at 527-528; see *id.* at 528 (discussing evidence that "large numbers of deportable criminal aliens skipp[ed] their hearings and remain[ed] at large in the United States unlawfully").

Second, *Zadvydas* involved "indefinite" and "potentially permanent" detention because it "ha[d] no obvious termination point." *Demore*, 538 U.S. at 528-529 (quoting *Zadvydas*, 533 U.S. at 690-691, 697). By contrast, as this Court emphasized in *Demore*, "*detention pending a determination of removability*" is inherently temporary because it has an "obvious termination point": the end of removal proceedings. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697). Removal proceedings always end, and the government expedites removal proceedings for detained aliens to promote their timely conclusion. See pp. 14-16, *supra*.

It follows *a fortiori* that the Constitution itself does not impose a six-month limitation on mandatory detention under Section 1226(c). *Zadvydas* imposed a six-month presumption as a matter of statutory interpre-

tation, not as a constitutional mandate. 533 U.S. at 699. The justifications for adopting that presumption in *Zadvydas* are absent here because the two cases are "materially different." *Demore*, 538 U.S. at 527. And the Court in *Zadvydas* did not suggest that the Due Process Clause itself imposed a six-month limitation on the duration of mandatory immigration custody as a general matter. Rather, the Court concluded that six months was a "presumptively reasonable" time during which detention after entry of a final order of removal continued to serve the particular immigration purpose at issue there: to effectuate the final order that the alien be removed. *Zadvydas*, 533 U.S. at 701. And even then, there was no rigid six-month rule or requirement of a bond hearing. The alien could continue to be detained beyond that point, without a bond hearing, if he failed to provide good reason to believe that there was no significant likelihood of removal in the reasonably foreseeable future. *Ibid.*

2. The justifications for detaining a criminal alien during his removal proceedings continue for the full duration of those proceedings

Mandatory detention of a criminal alien under Section 1226(c) during removal proceedings is constitutional where it continues to "serve its purported immigration purpose." *Demore*, 538 U.S. at 527 (citing *Zadvydas*, 533 U.S. at 690); see *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 540; *Wong Wing*, 163 U.S. at 235-236; see also *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). As *Demore* itself illustrates, that detention mandate does not cease to be justified whenever the removal proceedings to which the detention is tied last six months.

a. First, the government's interest in effectuating removal of a criminal alien if he is ordered removed at the end of the proceedings does not dissipate at the six-month mark (or any other fixed point). It cannot be conclusively established until the end of removal proceedings whether an alien will be ordered removed, because those proceedings are the "sole and exclusive" means for making that determination. 8 U.S.C. 1229a(a)(3). The prospect of removal, and the government's interest in effectuating it, thus remain concrete throughout.

Furthermore, the risk that a criminal alien will commit further crimes or otherwise present a danger to the community if released will ordinarily remain constant until removal proceedings are completed. There is no reason to believe that risk would dissipate at six months in any one case, much less in every case. Similarly, the risk that a criminal alien, if released, will fail to appear for removal proceedings does not dissipate at the six-month mark. Indeed, the government's interest in keeping the alien in custody (and the alien's incentive to abscond) will typically *increase* over time as removal proceedings progress towards their completion and the likely conclusion that the alien will be ordered removed. See pp. 16-17, *supra*. A criminal alien on the cusp of removal has a greater incentive to abscond than one who is at the beginning of his proceedings.

Section 1226(c) also does not cease to be justified when a criminal alien makes choices during the proceedings that necessarily add time to the resolution of his case—and therefore to the detention that Congress found to be a necessary aspect of those proceedings. For example, in *Demore*, the alien's "removal hearing

was scheduled to occur" after five months, but the Court noted that "[he] requested and received a continuance to obtain documents relevant to his withholding application." 538 U.S. at 531 n.15. The Court thus regarded the additional detention time added by the alien's continuance as fully justified.

The Court further noted that, if a criminal alien decided to appeal to the BIA, that typically added about four months to removal proceedings—and thus to the accompanying detention under Section 1226(c). See *Demore*, 538 U.S. at 529. But the Court similarly treated the added detention time reasonably consumed in disposing of the appeal as fully justified. "As we have explained before," the Court stated, "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow,' and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices." *Id.* at 530 n.14 (quoting *McGautha* v. *California*, 402 U.S. 183, 213 (1971)); see *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 30-31 (1973).

Justice Kennedy's concurrence in *Demore* reflects a similar understanding. Justice Kennedy joined the majority opinion and further explained that, in his view, an LPR "could be entitled" to a bond hearing "if the continued detention became unreasonable or unjustified." 538 U.S. at 532. But he viewed the constitutionality of continuing detention without a bond hearing as depending on why detention is continuing: If there were an "unreasonable delay *by the [Immigration and Naturalization Service (INS)]* in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of

flight or dangerousness, *but to incarcerate for other reasons*." *Id.* at 532-533 (emphases added).

Justice Kennedy could not draw such an inference, however, "from the circumstances of" *Demore* itself. 538 U.S. at 533. The clear implication is that the reasonable continuation of removal proceedings occasioned by an alien's choices—including seeking continuances, relief from removal, or appellate review—does not undermine the constitutionality of detention. So long as the added time is reasonably needed to adjudicate the case (not prolonged pointlessly or to punish), the ongoing detention continues to be constitutionally justified by the interests in "protect[ing] against risk of flight or dangerousness." *Id.* at 532-533.

b. Respondents assert that *Demore* is a "narrow exception to the general rule that civil detention may be imposed only after an individualized hearing as to danger and flight risk." Resps. Br. 12 (citing *Foucha* v. *Louisiana*, 504 U.S. 71, 81-83 (1992), and *United States* v. *Salerno*, 481 U.S. 739, 750 (1987)); see *id.* at 13 (citing *Addington* v. *Texas*, 441 U.S. 418 (1979)). The principal dissent in *Demore* made a similar argument relying on the same non-immigration cases. See 538 U.S. at 547-551 (Souter, J., concurring in part and dissenting in part). But the Court instead concluded that the relevant precedents were those "firmly and repeatedly endors[ing] the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens." *Id.* at 522 (collecting cases); see *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens."). That is because "[t]he power to expel aliens" is "essentially a power of the political branches of

government." *Carlson*, 342 U.S. at 537. So long as "aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." *Id.* at 534.

Even beyond that fundamental distinction, *Foucha*, *Addington*, and *Salerno* do not support bond hearings at the six-month mark. *Foucha* and *Addington* involved freestanding civil-detention regimes, not detention that is a reasonable incident to a separate adjudication—here, to serve the vital government interests in enforcement of the immigration laws and removal of criminal aliens. *Foucha* and *Addington* also involved detention that was indefinite and potentially permanent. *Foucha*, 504 U.S. at 82 ("indefinite"); *Addington*, 441 U.S. at 420 ("indefinite"). Mentally ill individuals were committed to a hospital for treatment, which might never end. *Ibid.* By contrast, the detention here is inherently temporary. "*[D]etention pending a determination of removability*" has an "obvious termination point" that comes in every case: the end of removal proceedings. *Demore*, 538 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 697). The government expedites detained cases to reach that inevitable end in a timely manner. See pp. 14-16, *supra*. Moreover, in *Addington* and *Foucha*, the state prohibited the patients from leaving custody. *Foucha*, 504 U.S. at 79 ("involuntary"); *Addington*, 441 U.S. at 420 ("involuntar[y]"). Detention during removal proceedings is not involuntary in that basic sense. The alien remains free to decline to seek continuances, relief from removal, or pursue other measures, and instead to accept a remov-

al order and thereby terminate the proceedings and resulting detention. See pp. 13-14, *supra*.[10]

Salerno also undermines a six-month rule. That case involved pretrial detention, 481 U.S. at 748, not detention of an alien pending removal proceedings. Indeed, *Salerno* cited *Carlson* and *Wong Wing* as establishing that that there is "no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation proceedings." *Ibid.* And *Salerno* "intimate[d] no view as to the point at which detention in a particular case might become excessively prolong-ed, and therefore punitive, in relation to Congress' regulatory goal." *Id.* at 747 n.4.

3. The liberty interests of criminal aliens detained under Section 1226(c) are ordinarily substantially diminished

The criminal grounds on which an alien is subject to mandatory detention are also grounds on which the alien is removable from the United States. See 8 U.S.C. 1226(c)(1). Removability ordinarily will have been established, beyond dispute, by the alien's judgment of conviction. But an alien is entitled to a *Joseph* hearing to seek to establish that the government is substantially unlikely to prevail in demonstrating that his conviction is one that subjects him to mandatory detention. 8 C.F.R. 1003.19(h)(2)(ii).

Not surprisingly, many criminal aliens detained under Section 1226(c) concede they are removable, and subclass members were virtually always found removable. See J.A. 96 (only 20 of 409 such completed cases

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[10] Many criminal aliens detained under Section 1226(c) are ineligible for asylum and withholding. See 8 U.S.C. 1158(b)(2)(A), 1231(b)(3)(B).

were terminated). Thus, while such aliens often nonetheless seek *relief* from removal, in the vast majority of cases "he or she has no right under the basic immigration laws to remain in this country." *Zadvydas*, 533 U.S. at 720 (Kennedy, J., dissenting); see *Demore*, 538 U.S. at 523 n.6 (distinguishing between being "*deportable*" and seeking relief from removal that may mean the alien will not "*ultimately be deported*"). Moreover, such requests by class members were usually for discretionary relief, such as cancellation of removal. See Resps. Br. 20 n.5; J.A. 94, 97. Such a request is "manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956); see *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict"). A criminal alien pursuing such discretionary relief notwithstanding that he is removable has greatly diminished due process interests in being released into society while that request is being considered.

The government's interest also becomes stronger (and a criminal alien's liberty interest weaker) when an IJ has ordered him removed. At that point, the government has devoted considerable resources to completing those proceedings; the IJ has concluded that the criminal alien is removable and ordered him removed; and further review will ordinarily leave that order intact. See p. 16, *supra*. If a criminal alien nonetheless makes the "difficult judgment[]" to appeal to the BIA, he does so knowing that it will extend his removal proceedings and resulting mandatory detention. *Demore*, 538 U.S. at 530 n.14 (citation omitted).

The imbalance becomes even greater if the BIA orders removal. And if the alien files a petition for review in a court of appeals, he need not abandon his claims to be released from immigration detention. Rather than seeking a stay of removal, he can depart or be removed and litigate from abroad. See pp. 13-14, *supra*. A criminal alien thus has a particularly weak interest in being released into the United States while seeking BIA review of an IJ removal order; weaker still when he files a petition for review and obtains a stay of removal, rather than litigating from abroad; and weaker further still when, at any stage, he does not dispute (or cannot reasonably dispute) that he is removable and thus lacks any substantive right to remain.

4. The pace of removal proceedings cannot be measured by a one-size-fits-all time limit

"[T]he complex course of events during removal proceedings" makes a fixed six-month yardstick particularly untenable. *Sopo* v. *U.S. Att'y Gen.*, 825 F.3d 1199, 1216 (11th Cir. 2016); see *Ly* v. *Hansen*, 351 F.3d 263, 272-273 (6th Cir. 2003) (discussing the "inevitable elasticity" of removal proceedings). "[R]emoval proceedings involve many * * * exigencies and the conduct of the criminal alien can equally affect the duration of that alien's removal proceedings." *Sopo*, 825 F.3d at 1216. Some criminal aliens may concede they are removable, pursue no relief, and be removed very swiftly. Others may concede that they are removable but ask the Attorney General or Secretary for relief from removal. "Some ask for multiple continuances"; "some choose to file frivolous appeals"; others file reasonable appeals; most do not appeal at all; "and each IJ has a docket with different demands." *Ibid.*

This Court's precedents under the Speedy Trial Clause in the criminal context illustrate how the Constitution cannot be read to superimpose a rigid deadline on the flexible and multi-layered adjudicatory system here. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend. VI. In interpreting that express constitutional guarantee, this Court has unanimously rejected a rule "that the government must be ready for trial *within six months of the date of arrest*, except in unusual circumstances." *Barker* v. *Wingo*, 407 U.S. 514, 523 (1972) (emphasis added).[11] "We cannot definitely say how long is too long," the Court stated, "in a system where justice is supposed to be swift but deliberate." *Id.* at 521; see *id.* at 538 (White, J., concurring) ("[C]ases will differ among themselves as to the allowable time between charge and trial.").

The Court in *Barker* found "no constitutional basis for holding" that the right "can be quantified into a specified number of days or months." 407 U.S. at 523. Adopting such a rule, the Court concluded, "would require this Court to engage in legislative or rulemaking activity," "rather than in the adjudicative process." *Ibid.* The "inflexible" approach of a "fixed-time period," the Court reasoned, thus "goes further than the Constitution requires." *Id.* at 529. Instead, the Court held that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Id.* at 522.

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[11] The six-month rule had been adopted by the Second Circuit and was recommended by the American Bar Association. *Barker*, 407 U.S. at 523.

Under *Barker*, the Court has found that the Speedy Trial Clause was not violated in cases involving pretrial detention longer than six months. For example, the defendant in *Barker* itself had been in pretrial detention for "10 months." 407 U.S. at 517. And in *Vermont* v. *Brillon*, 556 U.S. 81 (2009), the defendant had been in pretrial detention for "[n]early three years." *Id.* at 84. The Court found no "show[ing] that [the defendant] was denied his constitutional right to a speedy trial" where extensive delays were attributable to him. *Id.* at 94.

Congress has also adopted a flexible, not rigid, standard in the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* As a starting point in the statutory calculation, a trial must commence within 70 or 90 days of the indictment, information, or defendant's first appearance. 18 U.S.C. 3161(c)(1), 3164(b). But the Act excludes time that elapses because of continuances found to be in the interests of justice, pretrial motions, and many other events, including when the government (not the defendant) is the movant. See 18 U.S.C. 3161(h). Those events thus expand the metric of what is "speedy" when doing so is justified by the circumstances of an individual case.

The lower courts have similarly adopted a flexible, not rigid, approach when deciding as-applied due process challenges to extended pretrial detention. Courts make such judgments "on the facts of individual cases," including the duration of detention, the evidence of dangerousness, the complexity of the case, and the respective responsibility of the government (or the defendant) for the time that has elapsed. *United States* v. *Zannino*, 798 F.2d 544, 547 (1st Cir. 1986) (per curiam); see *United States* v. *Gonzales Claudio*, 806 F.2d 334, 340-342 (2d Cir. 1986); *United States* v. *Hare*, 873

F.2d 796, 800-801 (5th Cir. 1989); *United States* v. *Gelfuso*, 838 F.2d 358, 359 (9th Cir. 1988). Under that approach, "the length of a detention period will rarely by itself offend due process." *United States* v. *Orena*, 986 F.2d 628, 631 (2d Cir. 1993).

Applying that case-specific approach, courts of appeals have repeatedly upheld pretrial detention lasting more than six months. *E.g.*, *United States* v. *El-Hage*, 213 F.3d 74, 76-81 (2d Cir.) (per curiam) (30-33 months), cert. denied, 531 U.S. 881 (2000); *United States* v. *Quartermaine*, 913 F.2d 910, 918 (11th Cir. 1990) (8-10 months); *Zannino*, 798 F.2d at 548-549 (16 months); *United States* v. *Landron-Class*, 705 F. Supp. 2d 154, 159 (D.P.R. 2010) (collecting circuit cases upholding 24, 32, and 40 months of pretrial detention); but see *United States* v. *Theron*, 782 F.2d 1510, 1516-1517 (10th Cir. 1986) (finding violation at four months). Indeed, a district court recently observed that, when "the length of the defendant's detention is relatively short, between six months and a year," some courts conclude "that due process challenges are premature" without a need to fully weigh the factors. *United States* v. *Omar*, 157 F. Supp. 3d 707, 716 (M.D. Tenn. 2016) (citation omitted); see *United States* v. *Tortora*, 922 F.2d 880, 889 (1st Cir. 1990) (finding claim "presently unripe" after "more than half a year" of pretrial detention). And even if a court finds that pretrial detention has become unconstitutionally prolonged, the remedy may not be a bond hearing or release in a particular case. Instead, it may be an order that a trial begin within a specified period. *E.g.*, *Theron*, 782 F.2d at 1516-1517. So too here. If a criminal alien believes that his removal proceedings and detention have become impermissibly prolonged, the more tailored rem-

edy is to advance those proceedings to a prompt conclusion (not to grant a bond hearing with the possibility of release).

As all of these authorities demonstrate, the Constitution furnishes no basis for imposing a one-size-fits-all six-month rule.

5. Class members' litigation choices necessitated much of the time that elapsed in removal proceedings and resulting detention

The record contains extensive evidence that, for the class as a whole, aliens' litigation choices considerably extended their proceedings.[12] First, extended periods elapsed for class members because they sought continuances, which are granted "for good cause shown." 8 C.F.R. 1003.29. Nearly all (86.9%) in-period class members requested a continuance; "over half" requested three or more; alien-requested continuances within the first six months of detention alone were typically responsible for more than half of that period (median 101 days) for aliens who sought one; and in 18.6% of cases, alien-sought delay in the first six months was 151 days or more. J.A. 136-137, 152-153. Aliens often have good reasons for seeking continuances and thus extending their proceedings, but that simply illustrates that there is a correspondingly good reason to extend the length of the detention during those proceedings. Otherwise, detention would not serve its purposes of preventing flight and recidivism by criminal aliens during those proceedings.

Second, requesting relief from removal necessarily extends the adjudication of removal proceedings (and

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[12] The Section 1226(c) subclass has comprised nearly half the class. J.A. 71, 92 (460 of 1000 studied class members).

incident detention under Section 1226(c)). For example, the median duration of detention for in-period class members who sought relief from removal (303 days) was 50 days longer than for those who did not (253 days). J.A. 195.

It also necessarily takes time to decide appeals: It requires briefing, may require oral argument, and the BIA must decide the case. An appeal to the BIA added 94 days to the median detention of in-period class members, and Ninth Circuit review added another 219 days—adding more than 10 months (313 days) total for both layers of review. J.A. 191. Moreover, the median for in-period class members who sought relief *and* two layers of appellate review (582 days) was nearly a year longer than the median for those who did none of the above (236 days). J.A. 197.

Notably, although seeking continuances, relief from removal, and appellate review necessarily extends the time needed to adjudicate a case, class members who made those choices usually did not prevail. Virtually all studied Section 1226(c) subclass members with completed cases were found removable. See pp. 35-36, *supra*. The alien was denied any kind of relief in 63% (259 of 409) of such cases. J.A. 96. And class members who sought BIA and/or Ninth Circuit review lost about 95% of the time. See p. 16, *supra*.

6. A constitutional mandate of bond hearings at six months would create a perverse incentive for criminal aliens to prolong proceedings

"[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens." *Demore*, 538 U.S. at 530 n.14 (brackets in original) (quoting *Zadvydas*, 533 U.S. at 713 (Kennedy, J., dissenting)); *ibid.* (discussing evidence of aliens released on bond filing

frivolous appeals to delay their removal). Most circuits to address the issue have rejected a requirement of bond hearings at the six-month mark, as a matter of statutory interpretation, in part because of this concern. See *Sopo*, 825 F.3d at 1216 ("[A] criminal alien could deliberately cause months of delays in the removal proceedings to obtain a bond hearing and then abscond and avoid removal altogether."); *Reid*, 819 F.3d at 501 (differentiating delays due to dilatory tactics); *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("[A]liens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get."); *Ly*, 351 F.3d at 272 (cautioning against rewarding aliens who "raise frivolous objections and string out the proceedings").

Indeed, mandating bond hearings after six months would create a powerful incentive for criminal aliens to prolong proceedings—and they have considerable ability to do so—because they otherwise cannot be released during removal proceedings and are highly likely to be ordered removed at the end. Respondents have emphasized that about 70% of class members have been granted bond after a *Rodriguez* hearing, and about 70% of those posted bond and were released. Resps. Br. 11; see J.A. 528-529. That suggests that an alien's chances of being granted bond under the injunction here (about two-thirds) and released (about half) were considerably higher than their chances of obtaining relief from removal (about a third), pp. 16, 42, *supra*, and far higher than their chances of winning a termination (about 5%), *id.* at 16, 35-36. Under a six-month rule, many criminal aliens would have a better prospect for avoiding removal not by litigating to comple-

tion, but by prolonging proceedings, obtaining bond, and absconding.

7. Requiring bond hearings for criminal aliens at six months would cause serious problems of flight and recidivism

If bond hearings were required at the six-month mark, a significant portion of criminal aliens who Congress concluded should *never* be released during removal proceedings nonetheless would be released after a bond hearing, giving them opportunities to flee or reoffend in the meantime. This Court in *Demore* found "striking" studies showing that, "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings," and another study finding that 23% of such aliens failed to appear. 538 U.S. at 519-520. The record in this case provides no basis for questioning that serious concern, or for concluding that criminal aliens released on bond after six months of removal proceedings are materially more likely to appear than those released on bond at the beginning.

EOIR has published statistics suggesting that flight remains a serious problem in the system as a whole, even with individualized screening. EOIR has reported that, in each fiscal year from 2011 through 2015, between 28% and 41% of initial completions involving aliens released on bond were *in absentia*. EOIR, *FY 2015 Statistics Yearbook*, P3 (Apr. 2016) (*2015 Yearbook*). Respondents rely (Br. 41 & n.15) on a website to suggest that the figure should be 14%. But that figure includes thousands of cases that were administratively closed through the exercise of prosecutorial discretion, and thus there was nothing to flee. See *2015 Yearbook* C5 ("other completions"). In any event, a 14% flight rate would still be a serious problem: that

would show that detained aliens were about three times as likely to flee if released on bond (14%) as class members were to have a substantive right to live inside the United States (5%). See p. 16, *supra*.

Evidence before Congress when it enacted Section 1226(c) also demonstrated that recidivism by released criminal aliens was a serious problem, notwithstanding individualized screening. See *Demore*, 538 U.S. at 518; *Zadvydas*, 533 U.S. at 713-714 (Kennedy, J., dissenting). Again, the record in this case provides no basis for questioning the seriousness of that problem, or for concluding that individualized screening at the six-month mark (rather than at the beginning) would solve it. Indeed, the then-Director of ICE recently testified before Congress that a significant portion of class members who were released on bond from October 2012 through December 2013 under the preliminary injunction in this case have been re-arrested by other law enforcement agencies, notwithstanding individualized bond hearings. Dep't of Homeland Sec., *Written Testimony of ICE Director Sarah Saldaña, for a House Committee on the Judiciary Hearing Titled "Oversight of U.S. Immigration and Customs Enforcement"* (Sept. 22, 2016).[13]

B. As-Applied Challenges Are An Adequate And Appropriate Remedy In Extraordinary Cases

For the reasons set forth above, the Constitution itself provides no basis for requiring bond hearings

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[13] That particular cohort likely consisted predominately of criminal aliens detained under Section 1226(c) because the preliminary injunction did not cover aliens detained under Section 1226(a), Pet. App. 148a, and the Section 1225(b) subclass appears relatively small, J.A. 90-91.

whenever removal proceedings and incident detention of a criminal alien under Section 1226(c) last six months. Rather, in an extraordinary case, the appropriate safety valve is an as-applied constitutional challenge in an individual habeas action that can take into account the reasons why that outlier case is an outlier in the first place. See Gov't Merits Reply Br. 19-21; Gov't Br. 46-50.

The Second and Ninth Circuits required bond hearings at the six-month mark, as a matter of statutory construction, in part because of concern that case-by-case adjudication could lead to different outcomes in similar cases and that there could be a large number of cases. See *Lora* v. *Shanahan*, 804 F.3d 601, 615-616 (2d Cir. 2015), petition for cert. pending, No. 15-1205 (filed Mar. 25, 2016), and cert. denied, 136 S. Ct. 2494 (2016). Most circuits to consider such a rule, however, have instead adopted a flexible "reasonableness" test as a matter of statutory interpretation. *E.g.*, *Sopo*, 825 F.3d at 1215-1217; *Reid*, 819 F.3d at 495-498. No court has held that the Due Process Clause itself imposes a one-size-fits-all rule of bond hearings after six months.

Under the six-month rule, many criminal aliens would obtain a bond hearing—and many of those would be granted bond and released—notwithstanding that their detention pending removal proceedings is constitutional. If courts instead evaluate individual cases in the context of as-applied challenges, the number of viable cases should be small. Rather than dragging its feet, the government expedites detained cases to ensure that they end with reasonable dispatch. See pp. 14-16, *supra*. And if there is delay, an alien can ask the IJ, BIA, or court of appeals to move faster. See *Barker*, 407 U.S. at 530-531.

"[F]ederal courts have the institutional competence to make fact-specific determinations," *Sopo*, 825 F.3d at 1217, as demonstrated by their ability to apply case-specific standards under the Speedy Trial Clause and as-applied challenges to prolonged pretrial detention, see pp. 37-41, *supra*. Respondents have provided no basis for concluding that, in exceptional cases, an as-applied constitutional challenge in an individual habeas action would be unworkable here. Cf. *Flores*, 507 U.S. at 314 (observing that there was "no evidence * * * that habeas corpus [wa]s insufficient to remedy particular abuses" in terms of detention for "undue periods"). In any event, concerns about workability would call for "legislative or administrative intervention, not judicial decree." *Sopo*, 825 F.3d at 1217 (quoting *Reid*, 819 F.3d at 498). A bright-line time limit would "go[] further than the Constitution requires." *Barker*, 407 U.S. at 529.

IV. The Constitution Does Not Require The Government To Conduct Bond Hearings Automatically Every Six Months, To Bear The Burden Of Proof (Much Less By Clear-And-Convincing Evidence), Or To Change The Bond Factors

A. Automatic Hearings Are Not Required

As set forth above, the Constitution does not require the government to provide bond hearings at the six-month mark for aliens in removal proceedings and incident detention under Section 1225(b) or Section 1226(c). It follows *a fortiori* that the Constitution does not require the government to conduct bond hearings automatically, every six months, for every alien in removal proceedings and incident detention under Section 1226(a). Federal regulations have long provided that aliens detained under Section 1226(a) are auto-

matically assessed for bond eligibility at the outset and, if denied bond by the Department of Homeland Security, informed of their opportunity to ask an IJ for a redetermination. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1); see J.A. 43 (notice given to detained aliens). An alien can appeal an IJ's bond ruling to the BIA. 8 C.F.R. 236.1(d)(3). And if the alien is denied bond or fails to post bond, he can later obtain another hearing by showing that "circumstances have changed materially." 8 C.F.R. 1003.19(e). The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, similarly allows for an additional bond hearing if "information exists that was not known to the movant at the time of the hearing and that has a material bearing on" the defendant's bail risk. 18 U.S.C. 3142(f). That is ample process.

The Due Process Clause does not require the government to provide redundant hearings automatically, that nobody has asked for, and where circumstances have not materially changed since the last one. See *Goldberg* v. *Kelly*, 397 U.S. 254, 267 n.14 (1970) ("Due process does not, of course, require two hearings."). Congress "emphatic[ally]" intended the government's discretionary decisions regarding detention under Section 1226(a) to be "presumptively correct and unassailable except for abuse." *Carlson*, 342 U.S. at 540. More broadly, "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). Under either standard, the existing procedures are fully sufficient. The risk of an erroneous deprivation and probable value of an additional hearing are near zero when a prior hearing has already occurred, nobody asked for a new one, or the alien asked but nothing has

materially changed. Conversely, the government's interest in avoiding unnecessary burdens looms large. Every minute an IJ spends conducting a redundant bond hearing is a minute that the IJ would have better spent adjudicating a removal case.

B. The Government Need Not Bear The Burden Of Proof, Much Less By Clear-And-Convincing Evidence

1. The Constitution does not require the government to bear the burden of establishing that the alien will be a flight risk or danger—much less by clear-and-convincing evidence—to justify temporary detention pending removal proceedings. In the entire history of federal immigration law, this Court has *always* affirmed the constitutionality of detention pending removal proceedings notwithstanding that the government has *never* borne the burden to justify that detention by clear-and-convincing evidence. *E.g.*, *Demore*, 538 U.S. at 531; *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538; see *Zadvydas*, 533 U.S. at 701. Indeed, this Court has upheld detention pending removal proceedings on the basis of a categorical, rather than individualized, assessment that a valid immigration purpose warranted interim custody. *Demore*, 538 U.S. at 523-527 (discussing *Flores* and *Carlson*). Moreover, longstanding regulations place the burden on the alien in bond hearings under Section 1226(a), 8 C.F.R. 236.1(c)(8), and even respondents have never contended that those regulations are unconstitutional as applied in an initial bond hearing.

Furthermore, *Demore* upheld mandatory detention under Section 1226(c), which expressly puts the burden on the alien in the only situation in which release is permitted. Section 1226(c) altogether prohibits release of the specified criminal or terrorist aliens, ex-

cept that the alien may be released if it is "necessary" for witness protection and "the alien satisfies the Attorney General" that he "will *not* pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2) (emphasis added). Counsel for the alien in *Demore* told this Court that there would be "no problem" with placing the burden on the criminal alien. *Demore* Oral Arg. Tr. 48. By that time, the alien in *Demore* had already been in removal proceedings for more than six months and they would take longer still to complete. 538 U.S. at 531. And in *Zadvydas*, this Court placed the burden on the alien who is subject to potentially indefinite detention following entry of a final order of removal to show "that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701.

The court of appeals relied on *Addington* to hold that the government must bear the burden by clear-and-convincing evidence at the six-month mark. Pet. App. 53a. But as explained above, *Addington* is inapposite and certainly does not support a novel rule shifting the burden to the government at the six-month mark. Unlike involuntary commitment of a mentally ill resident, the government has plenary authority over immigration and the exclusion or expulsion of aliens. See *Flores*, 507 U.S. at 305 ("Over no conceivable subject is the legislative power of Congress more complete.") (brackets and citations omitted). Unlike the free-standing regime of civil commitment in *Addington*, detention here is a vital incident of removal proceedings in which the alien enjoys significant protections and the opportunity to apply for relief from removal. Unlike the involuntary commitment in *Adding-*

ton, an alien may voluntarily end removal proceedings and the immigration detention incident to them. See pp. 13-14, *supra*. Unlike civil commitment, which is potentially permanent, "*detention pending a determination of removability*" is inherently temporary. *Demore*, 538 U.S. at 529 (quoting *Zadvydas*, 533 U.S. at 697). *Addington* thus provides no basis for a constitutional mandate shifting the burden to the government and requiring clear-and-convincing evidence to justify temporary detention in the interim.

2. An inflexible constitutional mandate that the government must bear the burden in every bond hearing—particularly by clear-and-convincing evidence—would seriously damage the immigration system.

For a century, Congress's consistent judgment has been that an alien at the threshold of initial entry must be placed in removal proceedings and detained in the meantime unless he is "clearly and beyond a doubt entitled to be admitted," 8 U.S.C. 1225(b)(2)(A), or is paroled into the United States by the Secretary, 8 U.S.C. 1182(d)(5). Holding that the Constitution itself both requires the government to conduct a bond hearing for such aliens, *and* requires the government to bear the burden of proof to justify interim exclusion, would invert that consistent judgment of caution. It would embody a judgment that the Constitution commands that the Nation assume the risks of allowing release into the United States of aliens arriving at our borders for the first time, even before a final determination of their admissibility is made. It would also reward the party with the best access to information regarding flight risk and danger—the alien—for not sharing it, allowing an inadmissible alien to physically enter the United States due to the government's lack

of information showing that he is *not* a flight risk or danger. Cf. *Rossi* v. *United States*, 289 U.S. 89, 91-92 (1933) (allocating burden in part due to information asymmetry); *United States* v. *Denver & Rio Grande R.R.*, 191 U.S. 84, 92 (1903) (same). The result would be an increased risk that aliens who otherwise would be excluded instead would be allowed into the United States in the interim and thereafter abscond or cause harms that the immigration laws are designed to prevent. Requiring *clear-and-convincing evidence* to warrant interim exclusion would make the problem even worse. And because it would be a constitutional rule, Congress would have limited authority to respond.

Holding that the Constitution requires the government to conduct bond hearings and bear the burden with respect to criminal aliens detained under Section 1226(c) would similarly cause many of the harms of flight and recidivism that Congress enacted that provision to prevent. Congress enacted Section 1226(c) because IJs could not predict *ex ante* which released criminal aliens would reoffend or flee, and experience showed that they did so "in large numbers." *Demore*, 538 U.S. at 513. Shifting the burden to the government would not only largely restore the *status quo ante*, as IJs would again need to predict flight risk and recidivism —the very undertaking Congress declined to entrust to them—but also would exacerbate the problem. Before Congress enacted Section 1226(c), an LPR convicted of an aggravated felony already bore the burden in bond hearings, and all other aliens with such convictions were categorically prohibited from being released on bond. See 8 U.S.C. 1252(a)(2)(A) and (B) (1994). Shifting the burden to the government *and* requiring clear-and-convincing evidence would make that

prediction problem even worse, ensuring that IJs would release an even larger proportion of criminal aliens who would then flee or reoffend.

Holding that the Constitution requires the government to bear the burden of proof in six-month bond hearings under Section 1226(a) would similarly cause practical problems that Congress has sought to address. Initially, the 1917 Act provided that, when an alien is taken into custody for removal proceedings, "he may be released under a bond." § 20, 39 Stat. 891. A circuit conflict developed, with some courts holding that the phrase "he may be released" meant that the alien had a presumptive right to be released, and others holding that the decision rested with the government's discretion. See *Carlson*, 342 U.S. at 538-540. Congress responded by "enacting the precursor" to Section 1226(a), which "eliminated any presumption of release pending deportation" and instead expressly "committ[ed] that determination to the discretion of the Attorney General." *Flores*, 507 U.S. at 306 (citing *Carlson*, 342 U.S. at 538-540).

In exercising that discretion, the government previously applied a presumption that non-criminal aliens detained under Section 1226(a) would be released on bond, unless the government could show by a preponderance of the evidence that he was a flight risk or danger. See 62 Fed. Reg. 10,323 (Mar. 6, 1997). Over time, however, the INS was "strongly criticized for its failure to remove aliens who are not detained." *Ibid.* Accordingly, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, Congress provided "budget enhancements and other legislation," including for increased bed space to hold aliens, to "increase[]

detention to ensure removal." 62 Fed. Reg. at 10,323. The INS responded by amending its regulations to place the burden on the alien, which it concluded was "consistent with the intent of Congress" in enacting IIRIRA. *Ibid.* Shifting the burden back to the government, by contrast, would impede removal efforts and lead to more "failure[s] to remove aliens who are not detained." *Ibid.* Requiring clear-and-convincing evidence would magnify that problem, and constitutionalizing the burden would make it permanent.

C. The Length Of Detention Is Not A Relevant Bond Factor

Finally, even if (contrary to our submissions above) the Due Process Clause did require a bond hearing under Section 1225(b) or 1226(c), or an automatic additional hearing under Section 1226(a), the length of an alien's detention would not be a relevant consideration in determining whether bond was warranted. In the context of removal proceedings, the purpose of a bond hearing is to ensure on an individualized basis that the alien does not pose a flight risk or a danger to society in the interim. As discussed at length above, however, the passage of time does not diminish those risks and, indeed, in many cases increases them. The Due Process Clause, therefore, does not require the government also to put a substantive thumb on the scale in favor of releasing the alien into the United States.

The court of appeals' only justification for forcing IJs to consider duration was that "longer detention requires more robust procedural protections." Pet. App. 56a. But under the court's (erroneous) ruling, the passage of time would already trigger the "more robust procedural protections" of the bond hearing itself that Section 1226(c) or 1225(b) would otherwise not permit

(or that would not be automatically provided under Section 1226(a)). That approach would also exacerbate the incentive to delay, because delaying would both trigger a bond hearing and further increase the likelihood of release.

In the criminal context, bail determinations are made on the basis of flight risk or danger, not the duration of detention. 18 U.S.C. 3142(f)(2), 3143(b)(1)(A). Moreover, when removal proceedings have taken six months for detained aliens, they usually have been relatively close to being complete—and in the end, the aliens usually have lost. See pp. 16-17, *supra*. Making duration a factor thus would increase flight risk at a time when the government's interest in preventing flight is particularly strong.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Acting Solicitor General is recused in this case.